IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

MARK G.,	)	
	)	2 CA-JV 2007-0019
Appellant,	)	DEPARTMENT B
	)	
v.	)	MEMORANDUM DECISION
	)	Not for Publication
ARIZONA DEPARTMENT OF ECONOMIC SECURITY and MARISABEL G.,	)	Rule 28, Rules of Civil Appellate Procedure
	)	
Appellees.	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. 16666400

Honorable Ted B. Borek, Judge

AFFIRMED

Jacqueline Rohr — Tucson
Attorney for Appellant

Terry Goddard, Arizona Attorney General
By Dawn R. Williams — Tucson
Attorneys for Appellee Arizona
Department of Economic Security

E C K E R S T R O M, Presiding Judge.

¶1 Appellant Mark G. challenges the juvenile court's order terminating his parental rights to his ten-year-old daughter Marisabel after a bench trial. Mark contends there was insufficient evidence to support the severance of his rights on any of the four

statutory grounds the juvenile court found the Arizona Department of Economic Security (ADES) had established by clear and convincing evidence: his incarceration, the length of time Marisabel had been in a court-ordered placement, and the previous termination of Mark's parental rights to another child. *See* A.R.S. § 8-533(B)(4), (B)(8)(a) and (b), (B)(10). Mark also maintains that there was insufficient evidence that terminating his parental rights was in Marisabel's best interests and that Marisabel's attorney was ineffective to such a degree that it "tainted the outcome of the case."

¶2 We will not disturb an order terminating parental rights so long as there is reasonable evidence to support the factual findings upon which the order is based. *Audra T. v. Ariz. Dep't of Econ. Sec.*, 194 Ariz. 376, ¶ 2, 982 P.2d 1290, 1291 (App. 1998). Stated differently, we will only reverse an order terminating a parent's rights if the order is clearly erroneous. *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, ¶ 4, 53 P.3d 203, 205 (App. 2002). And, provided there is sufficient evidence to sustain the court's order on one ground, we need not address the sufficiency of the evidence as to any other ground. *See Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, ¶ 27, 995 P.2d 682, 687 (2000); *Jesus M.*, 203 Ariz. 278, ¶ 3, 53 P.3d at 205.

¶3 Mark's parental rights to his son, Julio G., were terminated in September 2005. Julio had been removed from his mother's custody in October 2003 because she had been unable to care for him properly. In particular, the mother could not manage Julio's Type I, juvenile diabetes. Because Mark was incarcerated at the time, he could not care for Julio either. Julio was adjudicated dependent in November 2003, and both parents' rights were

terminated almost two years later. The juvenile court terminated Mark's rights based on the length of time Julio had remained in a court-ordered placement, *see* § 8-533(B)(8)(a) and (b), and the fact that Mark had been convicted of a felony and sentenced in March 2005 to a three-year prison term, *see* § 8-533(B)(4). This court affirmed the severance order on appeal, rejecting Mark's arguments that the juvenile court had erred in finding termination of Mark's rights was in Julio's best interests and that it had applied an incorrect legal standard in evaluating ADES's motion. *Mark G. v. Ariz. Dep't of Econ. Sec.*, No. 2 CA-JV 2005-0064 (memorandum decision filed Mar. 23, 2006).

¶4 In the meantime, at the end of January 2005, ADES took custody of Marisabel and two siblings, Marcos and Stephanie, after police officers responded to reports of substance abuse and domestic violence in the home where the mother was living with her sister, her sister's boyfriend, and Stephanie, then about a year and a half old. The officers found marijuana and crack cocaine throughout the home. Marisabel and Marcos were with their grandmother at the time; Marisabel had been living with her grandmother for about three months and had lived there sporadically in the past. Marisabel was first placed at Casa de los Niños, then in a group home, and, in July 2005, she and Stephanie were placed together in foster care.

¶5 ADES filed a petition alleging all three children were dependent. Marisabel was adjudicated dependent as to Mark in early April 2005 after he admitted the allegations of an amended dependency petition. He specifically admitted, *inter alia*, that he was incarcerated and expected to be sentenced to an additional period of incarceration.

Ultimately, Mark was convicted of robbery, a class four felony, and sentenced to an aggravated prison term of three years commencing at the end of March 2005, with seventy-one days' presentence incarceration credit. Mark also admitted Marisabel's mother could not "properly parent[] her children," including Marisabel, because of the "lack of suitable housing, domestic violence issues and substance abuse." And Mark admitted he had "a history of drug use and ha[d] been in and out of prisons throughout the life of his children."

¶6 After a review hearing in June 2005, the juvenile court found the children remained dependent and ratified the original case plan goal of reunification. The court noted that, although Mark wanted to "participate in any services that may be available to him," his "availability to participate or to provide placement is limited due to his incarceration." After a permanency hearing in November 2005, March 2006, and April 2006, the juvenile court found the children's dependent status persisted. The court changed the case plan goal to severance and adoption, and ADES filed a motion for termination of the parent-child relationship.

¶7 After a termination hearing conducted over three days in the ensuing months, the juvenile court in November 2006 entered extensive findings of fact and conclusions of law. It subsequently signed formal findings and conclusions that ADES had submitted, terminating Mark's parental rights to Marisabel on all grounds ADES had alleged in its amended motion and finding termination of his rights was in her best interests.

¶8 Section 8-533(B)(4) provides that a parent's rights may be terminated if "the parent is deprived of civil liberties due to the conviction of a felony . . . if the sentence of that parent is of such length that the child will be deprived of a normal home for a period of years." As we stated in *Jesus M.*, the focus is not solely on the amount of time a parent has yet to serve as of the date of the severance hearing or termination order but on "the total length of time the parent is absent from the family." *Id.*, 203 Ariz. 278, ¶ 8, 53 P.3d at 206. Thus, this court "reject[ed] the father's suggestion that we ignore the four years he had already spent incarcerated . . . ." *Id.* Mark makes a similar argument in this case, insisting that, when his rights were severed, very little time remained on his sentence. As our supreme court stated in *Michael J.*, which ADES relied on at the severance hearing:

> The trial court, in making its decision, should consider all relevant factors, including, but not limited to: (1) the length and strength of any parent-child relationship existing when incarceration begins, (2) the degree to which the parent-child relationship can be continued and nurtured during the incarceration, (3) the age of the child and the relationship between the child's age and the likelihood that incarceration will deprive the child of a normal home, (4) the length of the sentence, (5) the availability of another parent to provide a normal home life, and (6) the effect of the deprivation of a parental presence on the child at issue. After considering those and other relevant factors, the trial court can determine whether the sentence is of such a length as to deprive a child of a normal home for a period of years.

196 Ariz. 246, ¶ 29, 995 P.2d 682, 687-88.

¶9 Among its findings of fact, the juvenile court noted Mark had admitted that, except for relatively brief interludes, he had been incarcerated since March 1999. His initial prison terms were for assault and drug offenses, and, although he had been released for over

three months in 2000, he was reincarcerated after he violated his release conditions. Subsequently convicted of robbery, Mark was sentenced to the three-year prison term commencing in March 2005. The court also noted that Mark had admitted he started using drugs again during the three-month period he had been released from prison in 2000 and he had not worked when he was out of prison because of his substance abuse problem.

¶10 With respect to § 8-533(B)(4), the juvenile court found that

> the relationship between Marisabel and the father was minimal when he began a 6 1/2 year prison sentence when Marisabel was approximately three, having separated from the mother when Marisabel was about two; that the minor has been deprived of a normal parenting relationship as reflected in the minor's statement she does not know the father, that the forwarding of a few special occasion cards in the last year and a half are insufficient to establish a normal relationship, that another parent was not available to parent Marisabel at least from the time she was eight, and the father will not be available to begin actively working a case plan to establish a relationship for about another year.

The court added, "The father has not been compliant with the case plan, has been incarcerated for most of Marisabel's life, has not established a parenting relationship with her, and would not be available to parent due to his incarceration until at least August 2007."

¶11 There is ample evidence supporting the juvenile court's findings.[1] Indeed, Mark testified at the severance hearing that he had been incarcerated for all but ten months

[1]Although there were some discrepancies between the juvenile court's findings and Mark's testimony, they were immaterial differences as to the precise months Mark was on release.

of the preceding seven years. Mark concedes this in his opening brief but points out he also testified about the efforts he had made in prison to improve himself: he was learning how to read, he had denounced gang affiliations, and he "was willing to participate openly and truthfully with CPS [Child Protective Services] this time, that he hadn't been willing to do so in the past." Mark also pointed to evidence that showed he had made some effort to maintain a relationship with Marisabel and Stephanie, even though Stephanie was not his biological child.

¶12 To the extent there were conflicts in the evidence, it was for the juvenile court to resolve them based on the court's assessment of credibility. *See Ariz. Dep't of Econ. Sec. v. Oscar O.*, 209 Ariz. 332, ¶ 4, 100 P.3d 943, 945 (App. 2004). Similarly, it was for the juvenile court, as the trier of fact, to weigh the evidence in determining whether ADES had sustained its burden of proving the statutory grounds for terminating Mark's parental rights. "[W]e do not re-weigh the evidence on review." *Jesus M.*, 203 Ariz. 278, ¶ 12, 53 P.3d at 207. Deferring to the juvenile court, as we must, we conclude there was sufficient evidence to support the court's decision to terminate Mark's parental rights pursuant to § 8-533(B)(4).

¶13 We also reject Mark's contention that there was insufficient evidence to support the court's finding that termination of his parental rights to Marisabel was in her best interests. Although a statutory ground for terminating a parent's rights must be proved by clear and convincing evidence, only a preponderance of the evidence is required to establish that severance is in a child's best interests. *Kent K. v. Bobby M.*, 210 Ariz. 279,

¶ 22, 110 P.3d 1013, 1018 (2005). That it is in a child's best interests for a parent's rights to be terminated "may be established by either showing an affirmative benefit to the child by removal or a detriment to the child by continuing in the relationship." *Jennifer B. v. Ariz. Dep't of Econ. Sec.*, 189 Ariz. 553, 557, 944 P.2d 68, 72 (App. 1997).

¶14 Again, to the extent Mark points to conflicting evidence in the record, it was for the juvenile court to resolve those conflicts in the exercise of its discretion; we will not reweigh the evidence on appeal. *See Jesus M.*, 203 Ariz. 278, ¶ 12, 53 P.3d at 207. As the juvenile court noted in its termination order, there was evidence that Mark's efforts to avail himself of certain services while in prison were minimal, as were his contacts with Marisabel. The court also noted that a caseworker had testified that "there would be no impediment to [Marisabel's and Stephanie's] being adopted," that a home had been identified for them, and that it was in their best interests to "be adopted to a home with structure and support." The court further noted the evidence that permanency and certainty were crucial for Marisabel and Stephanie, the importance to the children that they be placed together, and Marisabel's comments to caseworkers that she did not know her father. The record contains ample evidence to support the juvenile court's finding that ADES had established by a preponderance of the evidence that severing Mark's parental rights was in Marisabel's best interests.

¶15 We summarily reject Mark's contention that he is entitled to relief based on the alleged ineffectiveness of Marisabel's counsel. He maintains counsel seems "to have substituted his own judgment instead of advocating for his client." First, Mark lacks

standing to raise this claim. *See In re Pima County Severance Action No. S-113432*, 178 Ariz. 288, 291, 872 P.2d 1240, 1243 (App. 1993) (father lacked standing to challenge juvenile court's failure to appoint independent counsel or guardians ad litem for children). Moreover, even assuming arguendo that a parent could, in certain circumstances, assert such a claim, the claim here is not even arguably colorable. We agree with ADES the claim is speculative at best. It hardly establishes counsel's performance was deficient and deprived Marisabel or Mark of a fair trial or a meaningful opportunity to be heard. *See Donald W., Sr. v. Ariz. Dep't of Econ. Sec.*, 215 Ariz. 199, ¶ 28, 159 P.3d 65, 73 (App. 2007). Finally, any claim was waived by Mark's failure to object below. *See In re Kory L.*, 194 Ariz. 215, ¶ 16, 979 P.2d 543, 548 (App. 1999).

¶16 Affirmed.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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GARYE L. VÁSQUEZ, Judge

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J. WILLIAM BRAMMER, JR., Judge